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December 16, 1986

OPINION NO. 86-17

SUBJECT: LEGAL EFFECT OF PROPOSITION M

REQUESTED BY: MAYOR DIANNE FEINSTEIN

PREPARED BY: DENNIS AFTERGUT, NOREEN AMBROSE, ROBERT A. KENEALEY, RICK JUDD, BURK E. DELVENTHAL, ANDREW SCHWARTZ, PAULA JESSON, MELBA YEE
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QUESTIONS AND CONCLUSIONS

1) Is Part One, setting forth Master Plan policies, of any legal force and effect?

Yes. Part One of Proposition M is of legal force and effect. It effectively amends the City Planning Code, adding eight Priority Policies to the Code and requiring that future land use actions be consistent with those Policies. However, the provision requiring that the Policies be added to the City's Master Plan is not legally binding. Nonetheless, this conclusion has little, if any, practical impact on the implementation of the Policies, since they are fully operative as part of the City Planning Code.

2) Is the requirement that the Planning Commission must make a finding of conformity with the eight Master Plan priority policies before issuing a permit for any demolition, conversion or change of use a legal limitation on the Planning Commission's Charter granted authority?

Yes, insofar as Proposition M adds the eight Priority Policies to the City Planning Code. The City Planning Commission may not approve any permit for demolition, conversion or change of use absent a finding that the proposed project is consistent with the Priority Policies. However, the City Planning Commission is not legally required to amend the Master Plan.

3) If the Master Plan priority policy provision is legal, will an environmental impact report be required before the Planning Commission may amend the existing Master Plan?

No. Although, in general, environmental review is necessary before the City Planning Commission may amend the Master Plan, Proposition M's requirement that the Master Plan be amended is not legally binding on the City Planning Commission.

4) If the Master Plan priority policy provision is legal, is the Planning Commission prohibited from issuing permits prior to the adoption of a revised master plan?

No. The City Planning Commission is not legally required to amend the Master Plan. Nonetheless, the City may not issue permits unless it finds the project consistent with the Priority Policies in the City Planning Code.

5) If the Master Plan priority policy provision is legal, is the Planning Commission prohibited from adopting a rezoning plan, such as South of Market or Neighborhood Commercial, prior to the adoption of a revised Master Plan?

No. The City Planning Commission may adopt rezoning plans without amending the Master Plan. Nonetheless, the City may not adopt a zoning ordinance or legislation which requires an initial study under the California Environmental Quality Act unless the City determines that the ordinance or legislation is consistent with the Priority Policies in the City Planning Code.

6) If the Master Plan priority policy provision is legal, does Proposition M prevent the Planning Commission from approving projects such as the expansion of the Conservatory of Music, the Irving Street Walgreens Store, various proposed hospital sponsored medical office buildings, the Pineview Housing Project and the Kaiser Hospital expansion if they conflict with the "M" policies?

Yes. The City Planning Commission may approve such projects if, considering all aspects of the project, the Commission finds that on balance, the project will further the Priority Policies and not obstruct their attainment.

7) Does Proposition M apply to office projects which may be proposed in the future by the Federal or State Government or the Redevelopment Agency, e.g., a new GSA building?

No. Proposition M does not apply to federally-owned office buildings proposed by the Federal government for its agencies' own use on federal lands. Nor does Proposition M apply to office projects proposed by the State government for its agencies' own use. Proposition M applies to the Redevelopment Agency only to the extent that it does not conflict with California redevelopment law and any redevelopment plan adopted by the Board of Supervisors.

8) Are Mission Bay and Executive Park prevented from proceeding in their current mixed use form unless there is a separate vote of the people authorizing the project by ordinance? This assumes that the office component of each project would be above the 400,000 square foot annual limit.

No. Proposition M does not necessarily prevent these projects from proceeding. However, the City could not approve the currently proposed office development components of both Mission Bay and Executive Park in their entirety in any single year without a separate vote of the people.

9) Is the Olympia and York office building on Central Block 1 and the proposed office and housing structures on East Blocks 1 and 2 stopped by Proposition M? (Assumes a building size of more than 400,000 square feet.)

No. Those projects may proceed pursuant to the applicable redevelopment plan.

10) Is the Ferry Building renovation stopped by Proposition M and will it take a separate vote of the people under "M"? (Assumes an office component of more than 400,000 square feet.)

No. Since the Ferry Building is surplus Port property not devoted to maritime uses, Proposition M applies to the Ferry Building. Because the office component of the Ferry Building renovation adds less than 400,000 square feet, Proposition M does not stop the project or require a separate vote of the people to approve the project.

11) Are all reconstruction and remodeling projects over 24,999 square feet brought within the Proposition M square footage cap? In other words, could all large office space renovation and remodeling projects be stopped by "M" if the space is not included within the 400,000 square foot annual allotment?

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No. The renovation or remodeling of office space is only subject to the office cap if it has the effect of adding 25,000 or more square feet of office space.

12) Does Proposition M apply to projects on land zoned for industrial uses, such as the Falstaff or Lucky Brewery sites, research and development projects which might be proposed along the waterfront in the Bayview or in Mission Bay or housing developments such as Poly High School?

Yes. If these projects require any governmental action within the scope of Proposition M, the requirements of Proposition M apply, regardless of the zoning district.

13) Does the construction of a building approved by a non-City entity, like the Redevelopment Agency, require the Planning Commission to reduce the amount of any available square footage cap?

Yes. Proposition M sets the cap on the amount of office space approved each year at 950,000 square feet. The City must reduce that amount by 475,000 square feet per year to account for previously approved projects, including projects which were approved by the Redevelopment Agency. Office projects approved by non-City entities in the future will count against the remaining 475,000 square foot cap.

14) Does the "beauty contest" criteria of the existing Downtown Plan apply to projects reviewed under the reduced Proposition M square footage cap?

Yes. Proposition M leaves intact City Planning Code Section 321, which contains the review criteria.

15) Is the proposed Federal Home Loan Bank building stopped by Proposition M's annual limit if it is more than 400,000 square feet? Would any building more than 400,000 square feet be stopped by "M" as there is no provision for carry over of footage to the next year?

No. Proposition M provides for the carryover of unallocated square footage to the next approval period. Therefore, it is possible to approve a project which includes more than 400,000 square feet of office space.

16) Do projects which have been approved, but for which permits have yet to be issued, such as the Showplace Square Hotel and Contract Center, a 33 unit housing complex at 17th and Eureka Streets, and a 41 unit housing project at 1150 Sacramento Street, fall under the provisions of Proposition M?

Yes. The City may not issue permits for approved projects that are subject to environmental review unless the City first finds that such projects are consistent with the Priority Policies added to the City Planning Code.

17) How does one calculate the amount of the Proposition M square footage cap that remains available to the Planning Commission after previously approved projects are deducted?

Proposition M sets the cap on new office development at 950,000 square feet. During the first years under Proposition M, the City must reduce that amount to 475,000 square feet each year to account for previously approved projects. Of the 475,000 square feet, the City must reserve 75,000 square feet each year for office buildings between 25,000 and 49,999 square feet. If the City approves less than 475,000 square feet in one year, the City may carry over the remainder to the next year.

18) Will Proposition M stop the conversion of the Mission Armory into a film production center under an agreement between a developer, the Mayor's Office of Housing and Economic Development and Community groups because it may conflict with the Master Plan priority policy provision?

No. The City may approve this project if the City finds that on balance, the project is consistent with the Priority Policies. With respect to the building permit and reclassification ordinance necessary for the Mission Armory project, the Department of City Planning initially makes the finding. In addition, before adopting the reclassification ordinance, the Board of Supervisors must find that the ordinance is consistent with the Priority Policies. If a party appeals the Department's approval or disapproval of a building permit to the Board of Permit Appeals, that body may review the Department's consistency finding insofar as it relates to the building permit.

QUESTION NO. 1

Is Part One, setting forth Master Plan policies, of any legal force and effect?

CONCLUSION

Yes. Part One of Proposition M is of legal force and effect. It effectively amends the City Planning Code, adding eight Priority Policies to the Code and requiring that future land use actions be consistent with those Policies. However, the provision requiring that the Policies be added to the City's Master Plan is not legally binding.

The explanation for these conclusions lies in the origins of Proposition M. Four members of the Board of Supervisors placed Proposition M on the ballot. The San Francisco Charter provides that four members of the Board may only submit to the voters ordinances "which the Supervisors are empowered to pass." (Charter Section 9.108(a).) Thus, whether the provisions of Proposition M are valid turns on whether the Charter empowers the Board to adopt those provisions.

The Charter authorizes the Board to amend the City Planning Code by adding new policies and requiring future land use decisions to be consistent with those policies. In contrast, however, the Charter does not empower the Board to amend the Master Plan. Accordingly, the provisions of Proposition M which require amendment of the Master Plan were beyond the Board's authority to submit to the voters.

In practical terms, however, this conclusion has little, if any, impact on the implementation of Proposition M's Priority Policies. The Policies are fully operative as part of the City Planning Code. As a result, future development will be subject to the Priority Policies as effectively as if those Policies were part of the Master Plan.

ANALYSIS

Part One of Proposition M adds Section 101.1 to the City Planning Code.[1/] Generally, the provisions of this new section fall into two categories: (1) provisions which do not call for amending the Master Plan and (2) provisions which do. The first category includes provisions which add the eight Priority

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[1/] For the text of Proposition M, see Exhibit A to this opinion.

Policies to the Code, and require that future development be consistent with those Policies[2] and with the Master Plan.[3] The second category includes provisions which would add the Priority Policies to the Master Plan and require that the Plan present "an integrated, internally consistent and compatible Statement of Policies for San Francisco."[4]

Charter Section 9.108 is the Charter provision which authorized four members of the Board of Supervisors to submit Proposition M to the voters. That section provides in part:

> "Any ordinance which the supervisors are empowered to pass may be submitted to the electors by a majority of the board at a general election or at a special election called for the purpose . . . . Any such ordinance may be proposed by one-third of the supervisors, or by the mayor, and when so proposed shall be submitted to the electors at the next succeeding general election." (Emphasis added.)

Since four supervisors submitted Proposition M to the voters, the question is whether Part One of Proposition M is an "ordinance which the supervisors are empowered to pass." For purposes of analysis, we consider separately the two categories of provisions described above.

With respect to the first category, Charter Section 7.501 empowers the Board of Supervisors to pass City Planning Code amendments. Accordingly, the sections of Part One which add the Priority Policies to the City Planning Code and require that future development be consistent with those Policies and with the Master Plan were properly submitted to the voters.[5]

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[2] Section 101.1(b), (c), and (e).

[3] Section 101.1(d) and (e). A finding of consistency with the Master Plan is not required until January 1, 1988.

[4] Sections 101.1(a) and (b). These sections state that the City Planning Commission must amend the Master Plan by January 1, 1988.

[5] There is nothing unusual about amending the Code to add policy statements or to require that subsequent actions be consistent with those policies. The City Planning Code already contains similar policy statements and regulations which the Board has enacted in the past. (See, among others, City Planning Code ("CPC") Sections 303, 304, 321.)

With respect to the second category, however, the Charter sections governing amendment of the Master Plan grant exclusive authority to the City Planning Commission. Section 3.524 provides:

> "It shall be the function and duty of the city planning commission to adopt and maintain, including necessary changes therein, a comprehensive, long-term, general plan for the improvement and future development of the city and county, to be known as the master plan." (Emphasis added.)

Charter Section 3.525 establishes the manner in which the Master Plan may be amended. Section 3.525 provides in pertinent part:

> "Adoption of the master plan or portions thereof or amendments, extensions or additions thereto shall be by resolution carried by the affirmative votes of not less than a majority of all the members of the commission." (Emphasis added.)

The Charter makes no provision for Board action in amending the Master Plan. Indeed, the only references to the Board of Supervisors in the Charter's scheme for enacting and amending the Master Plan are as follows: (1) a requirement that Commission resolutions adopting or amending the Master Plan "shall be certified to the mayor and the board of supervisors" (Charter Section 3.525); and (2) a provision stating that "the department of city planning may make such reports and recommendations to the . . . board of supervisors . . . as it may deem necessary to secure understanding and a systematic effectuation of the recommendations of the master plan." (Charter Section 3.526.)

In short, the Charter delegates exclusive authority to adopt and amend the Master Plan to the City Planning Commission. A city's charter is its constitution. The Board cannot pass an ordinance which abridges or infringes upon the Commission's charter-given authority. (See, Brown v. Berkeley (1976) 57 Cal.App.3d 223, 231.) Since the Board is "not empowered to pass" an ordinance amending the Master Plan, the Board could not properly submit to the voters those provisions in Part One which require such an amendment. Accordingly, the voters' subsequent

approval of those provisions is not legally binding.[6/]

In reaching our conclusion, we are mindful that courts strongly presume the validity of ballot propositions and construe such measures liberally to give effect to the voters' intent. These principles apply equally in construing the San Francisco Charter. When the voters adopted the Charter, they clearly limited the Board's authority to propose initiative measures. To uphold Proposition M's attempt to amend the Master Plan would subvert those limitations.

Moreover, the conclusions here give effect to the voters' intent that future development be consistent with the Priority Policies. In approving Proposition M, a majority of voters intended that the City adopt the eight Priority Policies and that future development actions be consistent with those policies. By effectively amending the City Planning Code to add the Priority Policies, the voters have accomplished that goal regardless of Proposition M's unsuccessful attempt to amend the City's Master Plan.[7/]

[6/] Proponents of Proposition M have suggested that because the City did not file a legal challenge to Proposition M before the election, the City is equitably estopped from claiming that any portion of Proposition M is invalid. It is well settled, however, that courts strongly disfavor preelection review of ballot propositions. In Brosnahan v. Eu (1982) 31 Cal.3d 1, 4, the California Supreme Court stated:

> "As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electorate process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." (Emphasis added.)

Having abided by this rule, the City would not be estopped from questioning the validity of a portion of Proposition M after the election.

[7/] The Master Plan contains general policies and objectives for the future development of San Francisco. If Proposition M had been effective in requiring an amendment to the Master Plan, the City Planning Commission would have had to undertake the process of revising the Master Plan to insure that all of its policy statements were consistent with the eight Priority Policies.

Proposition M's "severability clause" helps assure the achievement of this goal. That clause provides:

> "If any part of this initiative is held invalid by a court of law, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other parts of the initiative or applications which can be given effect without the invalid part or application hereof and to this end the sections of this initiative are separable."

The courts of this state generally give effect to such clauses by upholding the valid portions of initiative measures even when finding other portions invalid. (See, e. g., Patterson v. County of Tehama (1986) 184 Cal.App.3d 1546, 1568.) Accordingly, we conclude that the eight Priority Policies which Proposition M adds to the City Planning Code are of full legal force and effect.

QUESTION NO. 2

Is the requirement that the Planning Commission must make a finding of conformity with the eight Master Plan priority policies before issuing a permit for any demolition, conversion or change of use a legal limitation on the Planning Commission's Charter granted authority?

CONCLUSION

Yes, insofar as Proposition M adds the eight Priority Policies to the City Planning Code. The City Planning Commission may not approve any permit for demolition, conversion or change of use absent a finding that the proposed project is consistent with the Priority Policies. However, the City Planning Commission is not legally required to amend the Master Plan.

ANALYSIS

The provision of Proposition M which amends the City Planning Code to incorporate the "Priority Policies" is legally effective. (CPC Section 101.1(b).) The same is true of the provision requiring the City to make a finding of conformity with the Priority Policies before issuing a permit for demolition, conversion or change of use. (CPC Section 101.1(e).) However, the City Planning Commission is not legally required to amend the Master Plan to include the Priority Policies. (See Answer to Question No. 1.)

QUESTION NO. 3

If the Master Plan priority policy provision is legal, will an environmental impact report be required before the Planning Commission may amend the existing Master Plan.

CONCLUSION

No. Although, in general, environmental review is necessary before the City Planning Commission may amend the Master Plan, Proposition M's requirement that the Master Plan be amended is not legally binding on the City Planning Commission.

ANALYSIS

The California Environmental Quality Act (CEQA) requires environmental review before the City Planning Commission may amend the Master Plan. As discussed above, however, Proposition M's requirement that the Commission amend the Master Plan is not legally binding.

Although Proposition M does effectively amend the City Planning Code to incorporate the eight Priority Policies, this amendment to the City Planning Code does not require environmental review. CEQA does not apply to City Planning Code amendments adopted by initiative. (14 Cal. Admin. Code Section 15378.)

QUESTION NO. 4

If the Master Plan priority policy provision is legal, is the Planning Commission prohibited from issuing permits prior to the adoption of a revised master plan?

CONCLUSION

No. The City Planning Commission is not legally required to amend the Master Plan. Nonetheless, the City may not issue permits unless it finds the project consistent with the Priority Policies in the City Planning Code.

ANALYSIS

As discussed in the answer to Question No. 1, the City Planning Commission is not required to amend the Master Plan to incorporate the Priority Policies. Therefore, the City may approve permits without first adopting a revised Master Plan. However, the Commission may not approve a permit for a project governed by Subsection 101.1(e) of Proposition M unless the project is consistent with the Priority Policies added to the City Planning Code. Furthermore, for any such permit issued

after January 1, 1988, the Commission must also find that the project is consistent with the Master Plan. (CPC Section 101.1(e).)

QUESTION NO. 5

If the Master Plan priority policy provision is legal, is the Planning Commission prohibited from adopting a rezoning plan, such as South of Market or Neighborhood Commercial, prior to the adoption of a revised Master Plan?

CONCLUSION

No. The City Planning Commission may adopt rezoning plans without amending the Master Plan. Nonetheless, the City may not adopt a zoning ordinance or legislation which requires an initial study under the California Environmental Quality Act unless the City determines that the ordinance or legislation is consistent with the Priority Policies in the City Planning Code.

ANALYSIS

As discussed in the answer to Question No. 1, the City Planning Commission is not required to amend the Master Plan to incorporate the Priority Policies. Therefore, the Commission may adopt a rezoning plan, such as the plans for South of Market or Neighborhood Commercial Districts, without first revising the Master Plan.

Nonetheless, under Section 101.1(c) of Proposition M, the City may not adopt any zoning ordinance "unless prior to that adoption it has specifically found that the ordinance . . . is consistent with the Priority Policies . . ." which Proposition M adds to the City Planning Code. Section 101.1(e) of Proposition M also mandates this review for consistency prior to "adopting any legislation which requires an initial study under the California Environmental Quality Act . . . . " (Emphasis added.)

Therefore, the issue is whether rezoning plans, such as those for South of Market or Neighborhood Commercial Districts, are either "zoning ordinances" or "legislation which requires an initial study" under CEQA. To address this issue completely, we must consider the two stages in which the City typically implements rezoning plans.

First, the City Planning Commission or the Board of Supervisors adopts interim zoning controls while the Department of City Planning conducts a planning study and prepares permanent amendments to the City Planning Code. Second, the City Planning Commission and Board of Supervisors consider permanent legislation for the Board's adoption.

With respect to the first stage, City Planning Code Section 306.7 authorizes the Board of Supervisors and the City Planning Commission to adopt interim zoning controls by resolution. Since a resolution is not a "zoning ordinance," Section 101.1(c) of Proposition M does not apply to interim controls.

Less clear is whether interim zoning controls are "legislation" within the meaning of Section 101.1(e). Technically, the imposition of interim zoning controls is not a legislative act, but a quasi-legislative act. City Planning Code Section 306.7 specifically provides for interim zoning controls pursuant to a "legislative rule-making power." Arguably then, the imposition of interim zoning controls is not "legislation" subject to the consistency requirement of Section 101.1(e).

However, this argument rests on a fine distinction between legislative and quasi-legislative acts. Interim zoning controls may remain in effect for up to two years. During that period, all permit applications for projects in the affected area are subject to the interim controls. In light of the voters' clear intent to establish Priority Policies to guide significant planning decisions, courts are likely to construe broadly the phrase "any legislation" to encompass the adoption of interim zoning controls. Thus, before adopting interim controls, the City must find that they are consistent with the Priority Policies.

Turning to the second stage of the process, the adoption of a rezoning plan by a permanent amendment to the City Planning Code clearly constitutes a "zoning ordinance" within the meaning of Section 101.1(c). Rezoning plans, such as those for South of Market and Neighborhood Commercial Districts, require changes in both the Zoning Map of the City and County of San Francisco and in the text of the City Planning Code. The City may not adopt such rezoning plans unless the City first determines that the plan is consistent with the Priority Policies set forth in Proposition M.

In sum, under Proposition M the City must make consistency findings before adopting either (1) an interim zoning control which requires environmental review or (2) a rezoning plan as an amendment to the City Planning Code.

QUESTION NO. 6

If the Master Plan priority policy provision is legal, does Proposition M prevent the Planning Commission from approving projects such as the expansion of the Conservatory of Music, the Irving Street Walgreens Store, various proposed hospital sponsored medical office buildings, the Pineview Housing Project and the Kaiser Hospital expansion if they conflict with the "M" policies?

CONCLUSION

Yes. The City Planning Commission may approve such projects if, considering all aspects of the project, the Commission finds that on balance, the project will further the Priority Policies and not obstruct their attainment.

ANALYSIS

Proposition M provides that the City may not approve certain specified land use actions unless they are consistent with its Priority Policies.[8] These policies range from preserving existing neighborhood-serving retail uses to achieving the greatest possible earthquake preparedness. Proposition M does not say whether a proposed action must be consistent with each individual Policy or with the Policies as a whole. The issue may arise when the Policies, as applied to specific situations, conflict with one another.

The question here refers to several specific projects. As explained in the Answer to Question No. 12, whether these specific projects are subject to Proposition M depends on the nature of the projects. For purposes of this response, we assume that these projects are subject to Proposition M's consistency requirement and that the question is asking how to apply that requirement.

Past experience under the Master Plan provides important guidance. Before Proposition M, a variety of state and local laws already required the City to find consistency with the Master Plan before the City could approve certain actions.[9] In implementing these laws, the City's practice has been to base its finding of consistency upon a balancing of the various objectives and policies of the Master Plan. The court approved

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[8] The specified land use actions which must be consistent with the Priority Policies include the following: (1) zoning ordinances, (2) development agreements, (3) permits for any project or legislation which requires an initial study under the California Environmental Quality Act, (4) permits for any demolition, conversion or change of use, and (5) any action which requires a finding of consistency with the Master Plan. (See Sections 101.1(c) and (e).)

[9] For example, before the City may approve a tentative subdivision map or parcel map, the City must find that the proposed subdivision is consistent with the Master Plan. (Government Code Section 66473.5.) In addition, the City may not authorize any conditional use or variance which would adversely affect the Master Plan. (CPC Sections 303(c)(3) and 305(c)(5).)

this approach in Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco (1980) 106 Cal. App.3d 893, 915-916. There is no evidence that in passing Proposition M, the voters intended to alter the City's practice of determining consistency by considering the relevant policies as a whole.

This approach also conforms to the Guidelines adopted by the California Office of Planning and Research interpreting the requirement that zoning ordinances in general law cities be consistent with the general plan.[10] (Government Code Section 65860.) The Office of Planning and Research uses the following standard:

> "An action, program, or project is consistent with the general plan if it, considering all its aspects, will further the objectives and policies of the general plan and not obstruct their attainment." (1980 General Plan Guidelines (Revised 1982), pp. 74-77.)

Applying the same standard to Proposition M comports with the settled rule that where legislation is ambiguous, courts should give a reasonable and common sense construction that will lead to wise policy rather than absurd results. (Costa Mesa v. McKenzie (1973) 30 Cal.App.3d 763, 770.) Construing Proposition M to require that every action be consistent with each of the eight Priority Policies would lead to the extreme result of blocking most planning actions.

For example, Priority Policy No. 3 encourages affordable housing projects. (See, CPC Section 101.1(b).) Yet, building such projects would violate Policy Nos. 1 or 2 if the projects replaced existing housing or existing retail businesses. (Ibid.) As another example, the Priority Policy of preserving existing affordable housing could easily conflict with the Policy of achieving the greatest possible earthquake preparedness. (Ibid.) Thus, requiring perfect consistency with each of the Priority Policies could prevent many, if not all, affordable housing projects.

We conclude that the consistency requirement of Proposition M calls for a balancing of the eight Priority Policies rather than strict compliance with each and every one. Subject to the other provisions of Proposition M and the Code, the City Planning Commission may approve each project identified in this question if, after considering all aspects of the project, the Commission

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[10] The Office of Planning and Research administers the provisions of State law relating to general plans and consistency requirements.

concludes that approval of the project would further the Priority Policies and not obstruct their attainment. If a particular action would advance some Policies while frustrating others, a finding of consistency would be proper only if the Commission concludes that the benefits in furthering some of the Policies outweigh the harm in impeding others. [11/]

QUESTION NO. 7

Does Proposition M apply to office projects which may be proposed in the future by the Federal or State Government or the Redevelopment Agency; e.g., a new GSA building?

CONCLUSION

No. Proposition M does not apply to federally-owned office buildings proposed by the Federal government for its agencies' own use on federal lands. Nor does Proposition M apply to office projects proposed by the State government for its agencies' own use. Proposition M applies to the Redevelopment Agency only to the extent that it does not conflict with California redevelopment law and any redevelopment plan adopted by the Board of Supervisors.

ANALYSIS

The Federal Government

Proposition M does not apply to a federally-owned office building proposed by the Federal government for its agencies' own use on federal land, such as a new General Services Administration building. Principles of sovereign immunity control where Federal governmental activity is concerned. Where Congress does not affirmatively declare its agencies subject to regulation, the agency remains free of state and local regulation. (Hancock v. Train (1976) 426 U.S. 167, 178-179 (state may not require air pollution permits of Army, TVA or AEC facilities); see, Mayor v. United States (1943) 319 U.S. 441, 445 ("activities of the Federal Government are free from regulation by any state").)

[11/] The same analysis applies to entities other than the City Planning Commission required to make the consistency finding. (See Answer to Question No. 18.)

Congress has spoken on the subject of zoning regulation of federal buildings. The Federal Urban Land Use Act and its implementing regulations do not permit the City to block or restrict federal projects. (See, 40 U.S.C. Sections 531 et seq.; 41 C.F.R. Sections 101-19.100.)

The State Government

When the State engages in sovereign activities, such as the construction of buildings for State purposes, it is not subject to local regulation unless either the California Constitution permits local regulation or the Legislature has consented to such regulation. The State Constitution does not grant such consent. (Hall v. City of Taft (1956) 47 Cal.2d 177, 183.) As a general rule, the City may not require compliance with its zoning ordinances as to any office buildings which the State uses for governmental purposes. (City of Orange v. Valenti (1974) 37 Cal.App.3d 240, 244.) Therefore, Proposition M will generally not apply to restrict State office projects built for the use of State agencies.

The Redevelopment Agency

a. In General

The State of California has preempted the field of community redevelopment. (Redevelopment Agency v. City of Berkeley (1978) 80 Cal.App.3d 158, 169.) The State has authorized the Board of Supervisors to adopt redevelopment plans which have the same preemptive effect as State law. (Id. at 170-71.) Accordingly, local ordinances apply to Redevelopment Agency projects only insofar as they do not conflict with California redevelopment law and the redevelopment plan adopted by the Board of Supervisors. (Ibid.; Kehoe v. City of Berkeley (1977) 67 Cal.App.3d 666, 674.) [12/]

b. Yerba Buena Gardens

The office and housing developments referred to in Question No. 9 as the "Olympia and York office building on Central Block 1 and the proposed office and housing structures on East Blocks 1 and 2" are part of the proposed project known as the Yerba Buena Gardens. This development is in the Yerba Buena Center redevelopment area. The project is subject to a redevelopment

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[12/] In addition, City Planning Code Section 320(g)(2) exempts specified Redevelopment Agency projects from the office cap. Proposition M does not amend or otherwise affect this exemption.

plan which the Board of Supervisors originally adopted on April 25, 1966 ("the Plan"). A review of the Plan discloses that it empowers the Redevelopment Agency to determine the type, size, height, number, and use of buildings in the Plan area. The requirements of Proposition M are clearly inconsistent with the autonomy granted to the Redevelopment Agency to regulate office development in this redevelopment area.

Furthermore, the Redevelopment Agency has executed an extensive land disposition agreement with Olympia and York pursuant to Part III F. of the Plan. The disposition agreement contains detailed provisions prescribing the use of each aspect of the Yerba Buena Gardens development, including the specific amount and location of office space and housing to be built. These agreements between the Redevelopment Agency and Olympia and York preempt any and all local regulations, including Proposition M, which would dictate the amount of office space which could be built in this project. Moreover, Section 320(g)(2) specifically exempts these projects from the office cap limitations.

QUESTION NO. 8

Are Mission Bay and Executive Park prevented from proceeding in their current mixed use form unless there is a separate vote of the people authorizing the project by ordinance? This assumes that the office component of each project would be above the 400,000 square foot annual limit.

CONCLUSION

No. Proposition M does not necessarily prevent these projects from proceeding. However, the City could not approve the currently proposed office development components of both Mission Bay and Executive Park in their entirety in any single year without a separate vote of the people.

ANALYSIS

Before considering the effect of Proposition M on Mission Bay and Executive Park, we should make clear our understanding of the reference in this Question to "the 400,000 square foot annual limit."

Under Section 321 of Proposition M, the City may approve 950,000 square feet of additional office space each year.[13/]

[13/] When the Federal Government, the State Government or the Redevelopment Agency approve an office project, the City must deduct the project's square footage from the 475,000 square feet that the City Planning Commission may approve in any year, even though those projects are not themselves subject to the office cap review procedures. (See Answer to Question No. 13.)

Under a prescribed formula in Section 321.1, during the initial years after the passage of Proposition M, the City must reduce that amount to 475,000 square feet. Of this 475,000 square feet, the City must reserve 75,000 square feet for buildings adding between 25,000 and 49,999 square feet in gross floor area of office development. (CPC Section 321(b)(4).) This "small office building reservation" leaves available 400,000 square feet for large office projects, assuming no carryover from previous years. (See Answer to Question No. 13).

The Mission Bay and Executive Park projects both include a mixture of office development and other uses. The office development portion of each project exceeds 400,000 square feet. Proposition M specifically deleted exceptions from the annual limit which applied to these two projects. (CPC Section 320(g)(5).)[14/] Therefore, during those years when the City may allocate only 400,000 square feet for large office projects, the City could not approve these projects in their entirety without a separate vote of the people. The City may, however, approve parts of the proposed office components of these projects, subject to the annual square foot limit.

QUESTION NO. 9

Is the Olympia and York office building on Central Block 1 and the proposed office and housing structures on East Blocks 1 and 2 stopped by Proposition M? (Assumes a building size of more than 400,000 square feet.)

CONCLUSION

No. Those projects may proceed pursuant to the applicable redevelopment plan.

ANALYSIS

See Answer to Question No. 7 above.

[14/] See Exhibit B to this opinion, which is a copy of a November 20, 1986 letter from the City Attorney to the Zoning Administrator. The letter advised that Executive Park is not exempt from Proposition M.

QUESTION NO. 10

Is the Ferry Building renovation stopped by Proposition M and will it take a separate vote of the People under M? (Assumes an office component of more than 400,000 sq. ft.)

CONCLUSION

No. Since the Ferry Building is surplus Port property not devoted to maritime uses, Proposition M applies to the Ferry Building.[15] Because the office component of the Ferry Building renovation adds less than 400,000 square feet, Proposition M does not stop the project or require a separate vote of the people to approve the project.

ANALYSIS

The City's police power to regulate property under the jurisdiction of the Port Commission is subject to special constraints. These constraints arise from four sources: (1) the common law Tidelands Trust Doctrine, under which tidelands -- which include most Port property -- are held in public trust for purposes of maritime commerce, navigation and fisheries (hereinafter referred to as "maritime purposes") (See generally, Shively v. Bowlby (1893) 152 U.S. 1, 57; People v. California Fish Co. (1913) 166 Cal. 576; Calif. Const. Article X, Sections 3-4); (2) the Burton Act ("the Act"), which transferred the Port in trust to the City in 1968 for maritime purposes (Stats 1968, Ch. 1333); (3) the Transfer Agreement ("the Agreement") which the State and the City negotiated pursuant to the Act; and (4) a series of pertinent Charter amendments incorporating significant portions of the Act. (Charter Sections 3.580 et seq.)

The Act, the Charter, and the Transfer Agreement all grant the Port Commission the "exclusive power" to lease Port property under its jurisdiction to private parties for development if the Commission determines that the property "is not required" for maritime purposes (hereinafter referred to as "surplus Port property"). (Act, Part VII, Section 12; Charter Section

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[15] The project proposed by the Port Commission and Continental Development Corporation to renovate the Ferry Building also includes construction of a three-story office building on Pier 1 and the renovation of the Agricultural Building for a restaurant and the World Trade Club. These three structures have been collectively referred to as the Ferry Building complex.

3.581(f); Agreement, part VII, para. 20.) The Port Commission has made this determination with respect to the Ferry Building.[16] Thus, the question here is whether the City may regulate surplus Port property.

Initially, we note that none of the four authorities listed above directly addresses the scope of the City's police power over surplus Port property. Nonetheless, the City's historical authority to do so is clear. Before the State transferred the Port to the City in 1968, Harbors and Navigation Code Section 3000.7 empowered the City to apply its zoning ordinances to surplus Port property:

> "[T]he [San Francisco Port] authority shall request the City and County of San Francisco to provide zoning ordinances for property the authority intends to lease under Section 3000.5 [relating to surplus Port property] and said City and County is hereby authorized to prepare and adopt precise plans and zoning plans for such property pursuant to this section.[17] (Emphasis added.)

Nothing in the Act, the Charter, or the Transfer Agreement suggests that as part of its agreement to assume control over the Port, the City divested itself of its existing authority to regulate the Port's surplus property.

Moreover, the language in the Act, the Charter and the Agreement giving the Port Commission "exclusive power" to lease surplus Port property did not express such a divestiture. In the context of the City's statutory authority to impose its zoning ordinance on surplus property, the words "exclusive power" clearly meant that the Commission alone would decide such matters as whether Port property is surplus, whether it should be leased, for what purposes it should be leased, and on what terms it should leased. At the same time, however, in the absence of an express disavowal by the City of Harbors and Navigation Code Section 3000.7, the Commission's power to do these things remained subject to the City's police power in zoning matters.

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[16] On April 9, 1980, the Port Commission passed Resolution 80-36 which declared that the Ferry Building was not necessary for maritime purposes.

[17] The Legislature enacted this section in 1937, when the State directly controlled the Port. In 1971, three years after the State transferred the Port to the City, the Legislature repealed this section.

Several principles of statutory construction confirm this conclusion. First, to ascertain the intent of a Charter or statutory provision, courts look beyond the provision in question in order to give effect to the entire system of applicable law at the time the provision was adopted. (See, People v. Comingore (1977) 20 Cal.3d 142, 147. Hence, one must consider the Port Commission's power to lease surplus Port property in light of Harbor and Navigations Code section 3000.7. Such consideration necessarily leads to the conclusion that the voters' intent at the time of the transfer was that the Commission's power to develop surplus Port property continue to be subject to the City's zoning regulations.

Similarly, under the "municipal affairs" doctrine, a charter or statute must directly express, not merely imply, restrictions on the exercise of a city's police powers before a court will enforce such restrictions. Cal. Const., Art. XI, Section 7; see generally, City of Grass Valley v. Walkinshaw (1949) 34 Cal.2d 595, 599.) Since the Act, the Charter and the Agreement express no intention of repealing or limiting the City's police power to zone surplus Port property, the City retains that power.

In addition, an important rationale for exclusive Port jurisdiction does not apply to property which the Port Commission decides to use for nonmaritime purposes. That rationale is the Commission's expertise in maritime matters. Using Port property for nonmaritime purposes does not call for this expertise. Accordingly, the Commission's control over surplus Port property should give way to the City's general police power.

Since the legal authorities discussed above do not directly address the issue here, its resolution is not free from doubt. Previous City Attorney's opinions have concluded that surplus Port property is subject to the City's police power. (City Attorney Letter Opinion 69-82; City Attorney Opinion 86-05.) However, other advice letters have concluded that the Downtown Plan's office cap and the Office Affordable Housing Production Program do not apply to surplus Port property. (See, December 12, 1985 letter of the City Attorney to Director, Department of City Planning; December 13, 1985 letter of the City Attorney to Supervisor Willie B. Kennedy.) These advice letters relied solely upon Charter Section 3.581(f). That section provides that in leasing surplus property, the Port Commission shall authorize developments and uses that "the Commission finds will yield maximum profits to be used by the Commission in furtherance of commerce and navigation."

Upon reexamination, we now believe that the conclusions of these advice letters were incorrect. The letters mistook the Port's duty to maximize profits as a limitation on the City's

police power to regulate local property. The letters cited no authority supporting this construction of the Charter.

In addition to the two rules of construction already discussed, a third such rule undermines the conclusions of these advice letters. Courts interpret charters and other legislation so as to harmonize their various parts. (People v. Moroney (1944) 24 Cal.2d 638, 642.) The duty of the Port Commission under Charter Section 3.581(f) to maximize profits is easy to reconcile with the City's power to impose zoning ordinances. The Charter simply obliges the Port Commission to maximize the return from surplus Port properties within the confines of local land use regulation. Accordingly, the City retains its authority to regulate surplus Port property, and Proposition M applies to the Ferry Building.

This conclusion does not mean that Proposition M will necessarily stop the Ferry building renovation. Question No. 10 assumes an office component in this project of more than 400,000 square feet. The Ferry Building project's Final Environmental Impact Report states that the project adds 96,000 square feet of office space. This net addition is well within the 400,000 square foot annual limit in Proposition M. Though the Ferry Building project will have to compete like other proposed projects for an allocation of this available space, as a legal matter, Proposition M neither stops the project nor requires a special election to approve it.[18/]

QUESTION NO. 11

Are all reconstruction and remodeling projects over 24,999 square feet brought within the Proposition M square footage cap? In other words, could all large office space renovation and remodeling projects be stopped by "M" if the space is not included within the 400,000 square foot annual allotment?

CONCLUSION

No. The renovation or remodeling of office space is only subject to the office cap if it has the effect of adding 25,000 or more square feet of office space.

ANALYSIS

The office limitation provisions of City Planning Code Sections 320-325 apply only to those projects which fall within

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[18/] Under Proposition M, the Ferry Building project would not have to compete with other projects if the Ferry Building renovation added less than 25,000 square feet of office space.

the definition of "office development," as set forth in Section 320(g):

> "(g) 'Office development' shall mean construction, modification or conversion of any structure or structures or portion of any structure or structures, with the effect of creating additional office space . . ."

Section 320(a) defines the term "additional office space" as follows:

> "(a) 'Additional office space' shall mean the number of square feet of gross floor area of office space created by an office development, reduced, in the case of a modification or conversion, by the number of square feet of gross floor area of pre-existing office space which is lost."

Renovated or remodeled offices are subject to the office cap only if they have "the effect of creating additional office space," as defined in Section 320(a). If the renovation or remodelling does not create more than 24,999 square feet of additional office space, it is not subject to the office cap. (CPC Section 320(g)1.)

QUESTION NO. 12

Does Proposition M apply to projects on land zoned for industrial uses, such as the Falstaff or Lucky Brewery sites, research and development projects which might be proposed along the waterfront in the Bayview or in Mission Bay or housing developments such as Poly High School?

CONCLUSION

Yes. If these projects require any governmental action within the scope of Proposition M, the requirements of Proposition M apply, regardless of the zoning district.

ANALYSIS

Proposition M contains no provision limiting its application to any particular zoning district or portion of the City. Indeed, in amending City Planning Code Sections 320 through 325, Proposition M establishes a citywide limitation on

the amount of office development that may be approved.[19/]

Whether the projects named in Question No. 12 are subject to the requirements of Proposition M depends on the specific nature of the projects. If a project adds 25,000 square feet or more of office space, the project is subject to the annual limit provisions of Proposition M. (CPC Section 320(g)1.) In addition, projects are subject to a finding of consistency with the Priority Policies if the projects require any of the following: (1) adoption of a zoning ordinance; (2) adoption of a development agreement; (3) issuance of a permit or adoption of legislation which requires an initial study under the California Environmental Quality Act; (4) issuance of a permit for any demolition, conversion or change of use; or (5) an action which requires a finding of consistency with the Master Plan. (CPC Sections 101.1(c) and 101.1(e).)

With respect to projects "which might be proposed along the waterfront" on property under the Port Commission's jurisdiction, the Answer to Question No. 10 applies, if the property is devoted to nonmaritime uses.

QUESTION NO. 13

Does the construction of a building approved by a non-City entity, like the Redevelopment Agency, require the Planning Commission to reduce the amount of any available square footage cap?

CONCLUSION

Yes. Proposition M sets the cap on the amount of office space approved each year at 950,000 square feet. The City must reduce that amount by 475,000 square feet per year to account for

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[19/] While these provisions are contained in an ordinance commonly referred to as the "Downtown Plan Ordinance," they apply throughout the City and County of San Francisco, as is clear from the following: (1) the title of the ordinance (Ordinance No. 414-85), which states that the ordinance places "a limit on the amount of office development that may be approved citywide;" (2) the absence of any language limiting the applicability of these sections to specified districts, in contrast to such limiting language in other sections of the ordinance, such as Sections 138 and 149; (3) the reference in Section 324 to circumstances applicable throughout the City; and (4) the exemption for projects located in districts other than C-3 districts (CPC Section 320(g)(5)).

previously approved projects, including projects which were approved by the Redevelopment Agency. Office projects approved by non-City entities in the future will count against the remaining 475,000 square foot cap.

ANALYSIS

Before answering this question, we must first explain how the cap on office space is generally calculated under Proposition M.

Proposition M sets a 950,000 square foot cap on the amount of office space which the City may approve each year. (CPC Section 321(a).) However, Section 321.1 of Proposition M establishes procedures for reducing this annual limit to account for office projects approved within the last few years.

These procedures require the Department of City Planning to compile a list of building, alteration and site permits issued after November 29, 1984 for projects approved before November 4, 1986. (CPC Section 321.1(b).)[20/] The City Planning Commission must then reduce the 950,000 square foot cap by 475,000 square feet every year, until the amount of square footage on the list reaches zero. (Ibid.)

In answer to this question, the Department must include on the list projects which were previously approved by the Redevelopment Agency. Two provisions within Section 321.1(b) of Proposition M make this clear. First, that section requires the Department to survey the City's Central Permit Bureau records to compile the list of previously approved projects. The Central Permit Bureau issues the permits for projects approved by the Redevelopment Agency. Second, Section 321.1(b) specifically requires that "office development projects reapproved by the . . . Redevelopment Agency" be included on the list. These two provisions strongly imply an intent to reduce the cap to account for projects previously approved by the Redevelopment Agency.

With respect to State and Federal office projects, we reach the opposite conclusion. Section 321.1(a) of Proposition M requires the annual limit to be reduced to account for "building, alteration and site permits that were issued after November 29, 1984." The City does not issue such permits for State and Federal office projects. Neither the provisions of Section 321.1, nor the ballot materials on Proposition M, indicate that the voters intended such projects to be included on the list.

[20/] There is an exception for permits that have lapsed, were revoked, or were issued pursuant to the office cap review procedures. (Ibid.)

Therefore, the Department's list should not include office projects previously approved by the State or Federal governments.

Projects approved by non-City entities affect the square footage available for allocation in one other way. Under Section 321(a)(2), future projects approved by the Redevelopment Agency and the State and Federal government will count against the 475,000 square foot cap otherwise available for allocation by the City Planning Commission.[21]

Question No. 17 asks how to calculate the square footage cap that remains available after previously approved projects are deducted. First, the City must deduct the square footage of projects approved by non-City entities, as discussed in the previous paragraph.

Second, under Section 321(b)(4) of Proposition M, the City must reserve 75,000 square feet each year for new projects with 25,000 to 49,999 square feet of additional office space. If the City allocates less than 75,000 square feet to small buildings in any one approval period, the City may carry over the remainder, but only to the small building reserve for future years.

Third, as to the 400,000 square feet which may be allocated to large office buildings, the City may also carry over any unallocated square footage to future years. (CPC Section 321(a)(1).)

QUESTION NO. 14

Do the "beauty contest" criteria of the existing Downtown Plan apply to projects reviewed under the reduced Proposition M square footage cap?

CONCLUSION

Yes. Proposition M leaves intact City Planning Code Section 321, which contains the review criteria.

ANALYSIS

City Planning Code Section 321(b)(3) lists a number of criteria by which City agencies are to review proposed office developments in order to determine which developments "best promote the public welfare, convenience and necessity." (CPC

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[21] There is an exception for Redevelopment Agency projects which are covered by Section 320(g)(2). As discussed in the Answer to Question No. 7, this exception applies to Yerba Buena Center projects.

Section 321(b)(1).) The application of these criteria is sometimes referred to as the "beauty contest." Section 325 of Proposition M specifically provides that Section 321 "shall remain in effect . . ."

Thus, when reviewing projects under Proposition M, the City should continue to use the criteria set forth in Section 321(b)(3).

QUESTION NO. 15

Is the proposed Federal Home Loan Bank building stopped by Proposition M's annual limit if it is more than 400,000 square feet? Would any building more than 400,000 square feet be stopped by "M" as there is no provision for carry over of footage to the next year?

CONCLUSION

No. Proposition M provides for the carryover of unallocated square footage to the next approval period. Therefore, it is possible to approve a project which includes more than 400,000 square feet of office space.

ANALYSIS

Proposition M provides for the carryover of unallocated square footage to the next approval period. (Section 321(a)(1).) Therefore, should there be a carryover in the future, the City could approve a project which includes more than 400,000 square feet of office space. According to the Draft Environmental Impact Report for the project, the Federal Home Loan Bank building does not include more than 400,000 square feet of office space.[22] Also, see the Answer to Question No. 8.

QUESTION NO. 16

Do projects which have been approved, but for which permits have yet to be issued, such as the Showplace Square Hotel and Contract Center, a 33 unit housing complex at 17th and Eureka

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[22] Whether Federal law preempts the City from applying local ordinances, such as Proposition M, to the Federal Home Loan Bank requires an analysis of decisions applicable to that agency. (See, Fidelity Financial Corp. v. Fed. Home Loan Bank (9th Cir. 1986) 792 F. 2d 1432 and cases cited therein.) We do not understand Question No. 15 to include that issue. In fact, the Department of City Planning informs this office that the Bank has participated in the Downtown Plan review process.

Streets and a 41 housing project at 1150 Sacramento Street, fall under the provisions of Proposition M?

CONCLUSION

Yes. The City may not issue permits for approved projects that are subject to environmental review unless the City first finds that such projects are consistent with the Priority Policies added to the City Planning Code.

ANALYSIS

Proposition M adds Section 101.1(e) to the City Planning Code, which provides in relevant part:

> "Prior to issuing a permit for any project . . . which requires an initial study under the California Environmental Quality Act, . . . the City shall find that the proposed project . . . is consistent with the Priority Policies established above."

We understand that all of the projects referred to in this question were subject to environmental review. Accordingly, we assume that the California Environmental Quality Act required an "initial study" for each project.

Pursuant to City Planning Code Section 101.1(e), the City may not issue permits for these projects unless the City first finds that they are consistent with the Priority Policies set forth in Section 101.1(b). This requirement applies as of December 11, 1986, the effective date of Proposition M.

QUESTION NO. 17

How does one calculate the amount of the Proposition M square footage cap that remains available to the Planning Commission after previously approved projects are deducted?

CONCLUSION

Proposition M sets the cap on new office development at 950,000 square feet. During the first years under Proposition M, the City must reduce that amount to 475,000 square feet each year to account for previously approved projects. Of the 475,000 square feet, the City must reserve 75,000 square feet each year for office buildings between 25,000 and 49,999 square feet. If the City approves less than 475,000 square feet in one year, the City may carry over the remainder to the next year.

ANALYSIS

See Answer to Question No. 13.

QUESTION NO. 18

Will Proposition M stop the conversion of the Mission Armory into a film production center under an agreement between a developer, the Mayor's Office of Housing and Economic Development and Community groups because it may conflict with the Master Plan priority policy provision?

CONCLUSION

No. The City may approve this project if the City finds that on balance, the project is consistent with the Priority Policies. With respect to the building permit and reclassification ordinance necessary for the Mission Armory project, the Department of City Planning initially makes the finding. In addition, before adopting the reclassification ordinance, the Board of Supervisors must find that the ordinance is consistent with the Priority Policies. If a party appeals the Department's approval or disapproval of a building permit to the Board of Permit Appeals, that body may review the Department's consistency finding insofar as it relates to the building permit.

ANALYSIS

The Department of City Planning has informed this office that the Mission Armory project will require an initial study under the California Environmental Quality Act (CEQA), the issuance of a building permit, and the adoption of a reclassification ordinance. The City may approve the building permit and the reclassification ordinance necessary for the project only if the City finds that these actions are consistent with the Priority Policies. See Answer to Question No. 6 above.

Proposition M provides that "the City" must make this consistency finding, but does not say which City agency or agencies are responsible for doing so.[23] Because Proposition

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[23] The approval of building permits and the adoption of reclassification ordinances require action by various City agencies. With respect to a building permit, the Central Permit Bureau issues the permit after Department of City Planning review to insure compliance with zoning laws; the Board of Permit Appeals hears any appeal from the issuance or denial of the permit. (Charter Section 3.651.) With respect to a reclassification ordinance, the City Planning Commission approves or disapproves the proposed legislation and the Board of Supervisors adopts it. (Charter Section 7.501.)

M indicates no intent to change current procedures, those procedures should provide guidance on this issue. The problem is that the City currently uses two different procedures that may apply.

The first procedure is one requiring referral of certain proposed actions to the Department of City Planning for a determination of conformity with the Master Plan. (Charter Sections 3.527, 3.528, 6.202, 6.203 and 6.205.) This determination rests solely with the Department of City Planning. In most instances, however, the Department's finding is advisory only.

The second procedure, set forth in the City Planning Code, governs consistency determinations for conditional uses and variances. The Code prohibits the approval of such permits unless the decision-maker finds that the Master Plan will not be adversely affected. (CPC Sections 303(c)(3), 305(c)(5).) With respect to conditional uses, the Commission initially makes this decision, subject to appeal to the Board of Supervisors. With respect to variances, the Zoning Administrator initially makes the decision, subject to appeal to the Board of Permit Appeals.

In deciding whether to follow the first procedure or the second procedure under Proposition M, we look to the language of the measure. Sections 101.1(c) and 101.1(e) state that "the City," as opposed to the Department of City Planning, shall make the consistency finding. By using the general term "City," Proposition M indicates an intention that whatever City agencies have jurisdiction over the proposed action should make the consistency finding. Had the drafters of Proposition M intended to limit the consistency finding to the Department of City Planning, they could easily have said so. Thus, we conclude that in determining which agency is responsible for making the consistency finding, the City should follow the procedure currently used in connection with conditional uses and variances.

Accordingly, with respect to the Mission Armory, the Department of City Planning should initially determine whether the reclassification ordinance and building permit are consistent with the Priority Policies set forth in Proposition M. When the Board of Supervisors acts upon the reclassification ordinance, the Board must also make the consistency finding. If a party appeals the action on the building permit, the Board of Permit

Appeals may review the Department of City Planning's consistency finding.

Date: December 16, 1986

Respectfully submitted,

LOUISE H. RENNE
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APPROVED:

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PROPOSITION M (Continued)

reconsidered by any agency pursuant to a Court decision. This process shall continue until the Department is able to certify that all projects with approval dates on or before November 4, 1986 have received permits, have been abandoned or are no longer subject to litigation challenging their approval. Notwithstanding any other provision of the City Planning Code or the former provisions of Subsection 320(g), all projects in excess of 24,999 square feet of additional office space shall be included in the survey. The list shall not include permits for projects authorized pursuant to the office development competition set out in Subsection 321(b) and Section 322.

(c) Not later than February 1, 1987, and February 1 of each subsequent year as set out above, the Department shall certify in writing to the City Planning Commission at a public hearing the list of all projects enumerated in subsection (b) above, including the square footage of each project and the total of all such projects.

(d) Within 30 days of receipt of the Department's certification, the Commission shall reduce the 950,000 square foot annual limit established in Subsection 321(a)(1) by 475,000 square feet per approval period until the amount of square footage remaining on the Department's list is reduced to zero.

(e) If the City has authorized more than 475,000 square feet as part of the office development competition set out in Subsection 321(b) and Section 322 prior to November 4, 1986, any amount exceeding 475,000 square feet shall be separately deducted from otherwise allowable square feet calculated pursuant to subsection (d) above for the approval period and for subsequent approval periods until the total amount of square footage is reduced to zero.

Section 321.2 is added as follows:

SECTION 321.2. LEGISLATIVE REDUCTION OF ANNUAL LIMIT.

(g) The Board of Supervisors is permitted to reduce the annual limit defined in Subsection 321(a)(1).

Section 321.3 is added as follows:

SECTION 321.3. VOTER APPROVAL OF EXEMPTION OF OFFICE PROJECTS AUTHORIZED BY DEVELOPMENT AGREEMENTS.

Any office development approved pursuant to a development agreement under Government Code Section 65865 or any successor section may only be exempted from the annual limit set forth in Subsection 321(a)(1) after the exemption for such office development has been approved by the voters at a regularly scheduled election.

Section 325 is amended as follows:

SECTION 325. SUNSET CLAUSE.

The limit on office development set out in Planning Code sections 320, 321, 322, 323 and 324 as of October 17, 1985, as amended by the voters on November 4, 1986, shall remain in effect until amended or repealed by the voters of San Francisco at a regularly scheduled election.

PART 3—EMPLOYMENT

Be it ordained by the people of the City and County of San Francisco that Part II, Chapter II, of the San Francisco Municipal Code (City Planning Code) is hereby amended as follows:

Subsection 164(a) is amended as follows:

SECTION 164. SAN FRANCISCO RESIDENT PLACEMENT AND TRAINING PROGRAM.

(a) The City has determined in its certification of the Downtown Plan Environmental Impact Report and in its findings and studies leading to the adoption of Section 313 of the Planning Code that San Francisco and regional traffic and transit problems will become more intolerable as the number of non-resident employees increases in San Francisco as a result of new office development. In order to mitigate those adverse traffic and transit impacts, while protecting the City's residential areas from unwanted increases in density, the people determine that a policy of maximizing resident employment training and placement opportunities is needed.

Subsections 164(d) and (e) are added as follows:

(d) In order to ensure that the maximum number of San Francisco residents are trained and placed in employment opportunities in our City, the Board of Supervisors shall hold public hearings and not later than January 1, 1988 the City shall adopt legislation to establish a program which will coordinate the job training and placement efforts of the San Francisco Unified School District, the San Francisco Community College District, community-based non-profit employment and training programs, and other agencies from the public and private sectors, to assure maximum use of existing federal, state and local training and placement programs, and to develop such additional training and placement programs as deemed necessary.

(e) Should the Board of Supervisors determine that additional funds are needed for programs established pursuant to subsection (d) above, it shall consider the adoption of a San Francisco Resident Training and Placement Fee of not less than $1.50 per square foot as a condition of the approval of any application for an office development project proposing the net addition of 50,000 or more gross square feet of office space.

PART 4—SEVERABILITY CLAUSE

If any part of this initiative is held invalid by a court of law, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the other parts of the initiative or applications which can be given effect without the invalid part or application hereof and to this end the sections of this initiative are separable.

EXHIBIT A

City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

November 20, 1986

Robert W. Passmore
Assistant Director-
Implementation
Zoning Administrator
Department of City Planning
450 McAllister Street
San Francisco, CA 94102

Subject: Proposition M and Executive Park

Dear Mr. Passmore:

You have asked whether the City can pass an ordinance which would exempt additional office development planned for the Executive Park area from the "office cap" limitations of the Downtown Plan Ordinance as amended by Proposition M. In my opinion, the adoption of such an ordinance would not be effective.

Proposition M is an initiative measure. The San Francisco Charter prohibits an initiative measure from being amended except by a vote of the people. (Charter section 9.114) Thus, if the proposed ordinance exempting Executive Park is an amendment of Proposition M, the ordinance is unlawful under the Charter.

The proposed ordinance would be an amendment of Proposition M. Before Proposition M, the Downtown Plan Ordinance exempted a category of projects including Executive Park from the office cap provisions. (CPC Section 320(g)(5)). Section 320(g) of Proposition M specifically deleted that exemption. To add what Proposition M took away is to amend the initiative. Under the Charter, that can only be done by the voters.

It is immaterial that the proposed ordinance now before the Planning Commission seeks to revive the exemption for Executive Park by amending sections of the City Planning Code which Proposition M did not specifically address. The effect is the same, regardless of which specific Code sections are amended. As the courts have long made clear, a legislative body cannot do indirectly that which it is prohibited from doing directly.

Nor would adopting the proposed amendment before the effective date of Proposition M make any difference. The Proposition prohibits any change to the office cap provisions in effect on October 17, 1985, as amended by the voters on

EXHIBIT B

November 4, 1986, without voter approval. Thus, once Proposition M goes into effect, it would override any exemption added before the effective date.

The drafters of Proposition M have expressed their view that Executive Park is not subject to the office cap limitation. In support of this position, they point to Section 321.1 of Proposition M. That section establishes an "adjustment" process for reducing the overall City-wide ceiling for office space that may be approved annually. This process is to continue until the Department of City Planning can certify that "all projects with approval dates on or before November 4, 1986, have received permits . . ." or have been abandoned. The proponents of Executive Park argue that this language shows an intent that projects approved before November 4, 1986, are subject only to the adjustment process of Section 321.1, and not to the office cap limitations.

However, City Planning Code Section 322(a) undermines this argument. That section requires all office developments to undergo the office cap review procedure before a building or site permit may issue. Proposition M specifically reaffirmed that provision. (Section 325) Since no building or site permit has issued for office development at Executive Park, that development is subject to the office cap review procedure.

This is not to say that Proposition M applies "retroactively" to Executive Park. Proposition M does not invalidate the planned unit development that the City Planning Commission has approved. Proposition M does, however, subject applications for building or site permits for an office development project in Executive Park to the office cap review procedures.

The language of Proposition M compels this conclusion, despite private statements by the drafters that they did not intend to make Executive Park subject to the office cap limitation. Under the law, statements by the drafters of a measure which are not included in the ballot material are not relevant to its interpretation.

In my opinion, the proposed amendment to City Planning Code Section 175.1 would not be effective in exempting Executive Park from the office cap limitations of the Downtown Plan Ordinance.

Very truly yours.

Louise H. Renne

LOUISE H. RENNE
City Attorney

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EXHIBIT B